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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAY 05 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

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)  
Assessment and Collection )  
of Regulatory Fees for )  
Fiscal Year 2000 )

MD Docket No. 00-58

**REPLY COMMENTS OF PANAMSAT CORPORATION**

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby replies to the comments of Comsat Corporation ("Comsat") regarding the above-referenced Notice of Proposed Rulemaking ("NPRM").

**INTRODUCTION AND SUMMARY**

In past years, the Commission has taken the view that it was statutorily prohibited from assessing Section 9 space station fees upon Comsat to recover the costs of regulating Comsat's use of Intelsat satellites. In 1999, the D.C. Circuit held that the Commission's previously-held view was based on a "plain misreading" of Section 9. PanAmSat v. FCC, 198 F.3d 890, 896 (D.C. Cir. 1999) ("PanAmSat"). The Court concluded that Section 9 "plainly does not require — and may not permit — Comsat's exemption from space station regulatory fees." Id. at 895.

Although the Court left open the possibility that "the Commission might 'permissibly' read the statute as allowing a Comsat exemption," id. at 896, that possibility was foreclosed by the Open-Market Reorganization for the Betterment of International Telecommunications Act, P.L. No. 106-180, 114 Stat. 48 (2000) ("ORBIT").<sup>1</sup> In ORBIT, Congress removed any ambiguity that may have remained regarding the reach of Section 9 and the Commission's authority to impose space station fees upon Comsat for its use of Intelsat satellites. As the Commission now recognizes, ORBIT

<sup>1</sup> Even before ORBIT was enacted, there was no suggestion in the text or legislative history of the statute that Congress intended to give the Commission discretion to exempt Comsat's use of Intelsat satellites from the space station fee category. Further, even if the Commission had had the discretion to exempt Comsat, there was no policy justification for an exemption. To the contrary, when the Commission adopted the Signatory Fee in 1996, it made a policy determination that it was in the public interest to recover from Comsat the Intelsat-related regulatory expenses it generated. The Court subsequently struck down the Signatory Fee, but for reasons unrelated to this policy determination.

requires that the FCC ensure “parity of treatment” by assessing “similar regulatory fees” on Comsat and on others providing “similar services.” NPRM ¶ 17.

In their initial comments in this proceeding, PanAmSat and others supported the Commission’s effort to achieve parity in its regulatory fee program by applying the space station fee to Comsat’s use of Intelsat satellites. The “imposition of [space station fees] on Comsat is both consistent with the law and required to achieve equitable treatment of competing satellite service providers. Comsat has enjoyed a free ride for long enough, and should now be required to bear a share of the costs of Commission regulation.” Comments of GE Americom at 3.

Comsat, on the other hand, wants the Commission to maintain its space station fee exemption notwithstanding the critical developments — the resolution of the PanAmSat case and the enactment of ORBIT — that have occurred since the last regulatory fee proceeding. Comsat’s comments are replete with arguments that either have been rejected by the D.C. Circuit or rendered null by ORBIT. Comsat has presented no credible reason for exempting it from the space station regulatory fee that its U.S. competitors must pay. Accordingly, and as proposed in the NPRM, Comsat should be subject to this fee in connection with its use of Intelsat satellites.

## DISCUSSION

### **I. The Commission Should Disregard Comsat’s Efforts To Reargue Issues That The D.C. Circuit Has Resolved.**

Apparently on the theory that it was “not notified” of, and had “no opportunity to participate” in, the case, see Comsat Comments at 5, Comsat devotes the first two-thirds of its comments rearguing issues already decided by the D.C. Circuit in the PanAmSat case. Of course, Comsat’s failure to intervene in the court proceeding is immaterial — PanAmSat is binding law. It is elementary that, under the doctrines of *res judicata* and collateral estoppel, the Commission is not now free to disregard the Court’s decision. See Cotton v. Heyman, 63 F.3d 1115, 1119 (D.C. Cir. 1995); Martin v. Malhoyt, 830 F.2d 237, 263 (D.C. Cir. 1987).

The fact that Comsat did not participate in the PanAmSat proceeding may, however, explain its failure to comprehend the Court’s decision. For example, Comsat suggests that the Court was deciding the “still-open question” of whether Comsat, as a result of its Signatory status, was exempt from all Section 9 regulatory fees (*e.g.*, non-

space station fees, and space station fees not pertaining to Intelsat satellites). Comsat Comments at 18 n.9. Comsat later replicates its error by mischaracterizing the holding of the case as being that “Comsat is not ‘exempt’ by virtue of its Signatory status from paying any Section 9 regulatory fees that it would otherwise be obligated to pay.” *Id.* at 20. As the Commission well knows, that was not what the PanAmSat case was about.

The precise issue considered by the Court in PanAmSat was whether Comsat is exempt from paying space station fees under Section 9 in connection with its use of Intelsat (and Inmarsat) spacecraft. The Court framed the issue in terms of PanAmSat’s challenge to “the FCC’s exemption of Comsat Corporation from space station fees for satellites Comsat operates as part of the Intelsat and Inmarsat systems.” PanAmSat, 198 F.3d at 892 (citation and quotation omitted). There is no suggestion in the Court’s opinion that it was presented with, or that it was deciding, what Comsat characterizes as the “still-open question” of whether it was exempt from Section 9 generally.

The Court had little difficulty with the question that was presented. It noted that the “statute itself seems to have no suggestion that Comsat should be exempt” from paying space station fees based on its use of Intelsat satellites, and further found that “there is no obvious hook in the language [of Section 9] on which to hang an exemption.” *Id.* at 894-95. The Court held, therefore, that the FCC’s conclusion that Congress intended to exempt Comsat from paying space station fees based on its use of Intelsat satellites was premised on a “plain misreading of the statute.” *Id.* at 896.

In its comments, Comsat advances just such a “plain misreading” of Section 9 based on arguments that the Court considered and rejected. Comsat claims that the statute requires the FCC to exempt Comsat because: (1) the “full text” and “legislative report language” suggest that Congress did not intend for Comsat to pay space station fees; (2) Intelsat spacecraft are not licensed by the FCC or regulated under Part 25; and (3) Comsat does not receive a Part 25 license to use Intelsat capacity. The Court, however, took these arguments into account when it decided the PanAmSat case.

**A. The D.C. Circuit Was Well Aware Of The “Full Text” And “Legislative History” Of Section 9.**

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In its comments, Comsat continues to reference and rely on legislative history from a bill that was before Congress in 1991, and to insist that the “plain language” of the space station fee category does not reach Comsat. *E.g.*, Comsat Comments at 3-4, 8.

Indeed, Comsat recites at some length the Commission's earlier decisions exempting Comsat from paying space station fees — including the now vacated 1998 fee decision — as if they were authoritative interpretations of Section 9. See id. at 4-5.

The D.C. Circuit has opined, however, that the Commission's earlier decisions were based on a "plain misreading" of the law. The Court found it questionable whether the legislative history of the fee statute even should be examined, because "[t]he statute itself seems to have no suggestion that Comsat should be exempt," and it was "most unclear ... where the necessary statutory ambiguity lurks." PanAmSat, 198 F.3d at 894-95. Based on the unambiguous language in the statute, the Court concluded that "the statute plainly does not require — and may not permit — Comsat's exemption from space station regulatory fees." Id. at 895. "Nor would the legislative history change that result, assuming the statute to be ambiguous enough to allow its consideration." Id.

Comsat's effort to reargue the import of Section 9's legislative history is odder still given the passage of ORBIT. Whatever inferences Comsat would like to draw from the legislative history of the 1991 bill, never enacted, that preceded the adoption of Section 9, Congress has made clear in ORBIT that the Communications Act contemplates no exemption for Comsat. Congress could not have been more explicit: "Notwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on [Comsat] which it imposes on other entities providing similar services." 47 U.S.C. § 642(c). And the legislative history of ORBIT provides additional evidence that Congress always intended for the FCC to have authority under Section 9 to impose space station fees upon Comsat in connection with Intelsat satellites. See H.R. Rep. No. 105-494 at 63 (1998) ("The Committee believes that the Commission currently has the statutory authority to impose such fees but wishes to make explicit here that the Commission does indeed have such authority.").

This background also disposes of Comsat's claim that the Commission is attempting to "revive the unlawful 'Signatory Fee' by disguising it as" a space station fee. Comsat Comments at 10 (citing Comsat v. FCC, 114 F.3d 223 (D.C. Cir. 1997) ("Comsat"). In the Comsat case, the D.C. Circuit vacated the Commission's effort to recover from Comsat the costs of regulating Comsat by amending the fee schedule to add a "Signatory fee." The Court concluded that the Commission had not demonstrated that the amendment had been made pursuant to a change in the law or in

its regulation of Comsat, as required by Section 9(b)(3). Comsat, 114 F.3d at 227-28. That holding, however, has nothing to do with the Commission's application of an existing fee category to an entity that the D.C. Circuit has found to be covered by the fee category. The fact that the Commission previously exempted Comsat from paying space station fees only means that Comsat has had a "free ride" in the past; it does not mean that the "free ride" must extend into the indefinite future.

In sum, the PanAmSat decision and ORBIT both dictate that Comsat's legislative history be rejected. If the Commission, relying on Comsat's interpretation of the legislative history, were to resurrect a Comsat exemption from paying Section 9 space station fees based on its use of Intelsat satellites, it not only would be flouting the D.C. Circuit's considered judgment, but also would be contravening the will of Congress.

**B. The Court Was Not Swayed By The Fact That The FCC Does Not License Intelsat Satellites.**

Just as it has resorted to the discredited argument that the text and legislative history of Section 9 exempt Comsat from paying space station fees, Comsat also resurrects the argument that the Commission may not impose space stations fees on Comsat based on its use of Intelsat satellites because Intelsat satellites are not licensed by the FCC. See Comsat Comments at 1, 3, 7-13. Without belaboring the point, this argument, too, already has been rejected by the D.C. Circuit.

First, although Comsat attempts to confuse the issues by suggesting that the proposal in the NPRM relates to the payment of space station fees by Intelsat, e.g., Comsat Comments at 13 ("it is difficult to fathom any reason why INTELSAT should pay regulatory fees"), there should be no mistake about it — the proposal in the NPRM relates to the payment of space station fees by Comsat based on its use of Intelsat satellites to provide commercial space segment services in competition to other U.S. space station operators. Thus, the fact that Intelsat is not licensed or regulated by the Commission, see Comsat Comments at 3, 8-9, is beside the point. Comsat is licensed and regulated by the Commission and it is Comsat that should pay space station fees to offset the costs of that regulation.

Second, the D.C. Circuit in PanAmSat dismissed outright the "Intelsat-is-not-licensed" argument. The Court noted that the legislative history of Section 9 "speaks of granting cost recovery authority 'consistent with FCC jurisdiction' for 'space stations

directly licensed by the Commission under Title III of the Communications Act.” PanAmSat, 198 F.3d at 896 (quoting H.R. Rep. No. 102-207 at 26). Because Comsat holds authorizations under Title III for its participation in the launch and operation of Intelsat satellites, the Court recognized, “imposing Section 9 fees on Comsat is consistent with the FCC’s Title III licensing jurisdiction” whether or not Intelsat space stations are licensed by the FCC. Id.

Moreover, Comsat’s assertion that “regulatory fees may be imposed only to recover costs that the Commission incurs in regulating the *facilities* that are subject to its jurisdiction,” Comsat Comments at 9, simply is wrong. The statute mandates that the FCC assess and collect regulatory fees to recover the costs of its regulatory activities, 47 U.S.C. § 159(a), and the Commission consistently has imposed regulatory fees based on its jurisdiction over regulated entities without regard to its “jurisdiction” over the facilities they use to provide service; e.g., the Commission assesses Comsat for bearer circuit fees even though the underlying facilities are aboard Intelsat satellites.

Third, Comsat’s attempt to analogize itself to operators of foreign satellites, who have not been required to pay space station regulatory fees, is misguided. See Comsat Comments at 12-13. The Commission runs up expenses in connection with its regulation of Comsat — the U.S. signatory to Intelsat, the largest investor in the Intelsat system, and the sole U.S. investor in the system — that have no counterpart in the case of foreign-licensed satellite systems. It is logical and appropriate, therefore, that Comsat should be required to pay the space station fee even if the operators of foreign satellites are not.

Finally, the fact that some Intelsat satellites are not accessible from the United States, see Comsat Comments at 14, is irrelevant for fee purposes. PanAmSat owns and operates international satellites that are not accessible from the United States, yet it pays space station fees for those satellites. The same principle should apply to Comsat.

**C. The Court Concluded That, At Least For Purposes Of Section 9, Comsat Is A Space Station Licensee Subject To The Commission’s Jurisdiction.**

Comsat claims that it should not pay space station fees in connection with its use of Intelsat satellites because it does not receive a Part 25 “license” to participate in Intelsat operations. See, e.g., Comsat Comments at 7-8. In fact, this very argument was raised by the Commission and rejected by the Court in the PanAmSat case:

At oral argument the Commission attempted a delicate distinction between, on the one hand, applications for satellite licenses, and on the other hand, Comsat's applications for approvals of its participation in the launch and operation of Intelsat satellites. The Commission insisted that, even though it issues its approvals of the latter under the authority of 47 U.S.C. § 309, it does not 'license' Intelsat satellites. But it seems perfectly reasonable to say under these circumstances that the Commission 'licenses' Comsat's operation of Intelsat satellites.

PanAmSat, 198 F.3d at 896. Comsat's fixation on "Part 25," therefore, misses the mark. The D.C. Circuit recognized that the Commission does, in substance if not in form, license Comsat's operation of Intelsat satellites.

In any event, far from being immune from "Part 25" regulation, the creation and regulation of Comsat under the Satellite Act was the very purpose for which Part 25 was created. See 28 Fed. Reg. 13037 (1963).<sup>2</sup> Although there are no "Part 25" provisions that expressly pertain to Comsat's applications to participate in Intelsat satellite operations, the FCC traditionally has processed Comsat applications as if they were Part 25 license applications: It places Comsat's applications on the same public notices as other Part 25 applications; it gives them file numbers matching those used for Part 25 applications; and the public notices state that petitions and comments concerning the applications should be filed in accordance with the same Part 25 rule, 47 C.F.R. § 25.154, that govern Part 25 applications. E.g., Report No. SPB-109 (Oct. 28, 1997).<sup>3</sup>

Elsewhere in its Comments, Comsat appears to recognize that Part 25 licensing is not a prerequisite for space station fee liability, acknowledging that DBS operators must pay the space station fee even though they do not hold Part 25 licenses. See Comsat Comments at 15-16. But Comsat attempts to downplay the significance of this fact,

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<sup>2</sup> Comsat notes that ORBIT eliminated the provisions in the Communications Satellite Act that the Commission's Part 25 rules implement governing Comsat's ownership structure. See Comsat Comments at 11. There is no suggestion, however, that by eliminating these provisions Congress intended to exempt Comsat from the space station fee. To the contrary, as discussed in Section II, below, Congress clarified in ORBIT that Comsat should be subject to the space station fee.

<sup>3</sup> The Commission long has regarded space station applications as Part 25 applications even when particular application requirements are not set forth in the rules. For example, in the Commission's 1983 Domsat Processing Order, 93 F.C.C.2d 1260, the Commission established a cut-off date for filing new domestic fixed-satellite space station applications. Although the contents of those applications were set forth in an "Appendix B" to that Order, and not in Part 25, there never was any suggestion that the applications filed in response were not "Part 25" applications or that the licenses subsequently granted were not "Part 25" licenses.

characterizing the non-Part 25 status of DBS as “ministerial.” *Id.* at 16. It is also “ministerial,” however, that the Commission declined to promulgate specific rule provisions within Part 25 codifying its policies regarding Comsat’s participation in Intelsat satellite operations. DBS operators pay the space station fee, ministerial matters notwithstanding, and the same should be true for Comsat.

Comsat’s formalistic references to Part 25 ignore what the D.C. Circuit found plain — as a matter of substance, the Commission “‘licenses’ Comsat’s operation of Intelsat satellites.” *PanAmSat*, 198 F.3d at 896. The Commission should reject Comsat’s effort to reargue that issue.

**II. To The Extent That There Remained Any Doubt Regarding Congressional Intent With Respect To Comsat’s Liability For Section 9 Fees Following The PanAmSat Case, ORBIT Resolved It.**

It is clear now as a result of ORBIT that Congress intends — and in fact requires — the FCC to impose space station fees on Comsat based on its use of Intelsat satellites. ORBIT provides that the Commission must ensure “parity of treatment” in assessing Section 9 fees. 47 U.S.C. § 642(c) (“notwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on [Comsat] which it imposes on other entities providing similar services.”).

Comsat seeks to minimize the effect and importance of ORBIT. In a self-contradictory argument, Comsat claims that ORBIT “does no more than codify the *PanAmSat* court’s holding that Comsat is not exempt, by virtue of its Signatory status, from liability for regulatory fees that it would otherwise be required to pay.” Comsat Comments at 17-18. Comsat follows that claim, however, with an assertion that it “has never claimed any special ‘exemption’ from” Section 9 generally. *Id.* at 20.

Comsat’s claims do not withstand scrutiny. If the *PanAmSat* case really were about whether Comsat had a general Section 9 exemption, but Comsat never sought such an exemption, then the D.C. Circuit would have dismissed *PanAmSat*’s appeal on mootness grounds. And, if Comsat’s liability under Section 9 generally had been the issue, then Congress would not have needed to enact the “parity of treatment” section of ORBIT following the *PanAmSat* decision.

The reality is that neither the *PanAmSat* case nor the ORBIT legislation was about whether Comsat was exempt from Section 9 in its entirety. Instead, the question



before both the D.C. Circuit and the Congress was precisely the issue that Comsat is attempting to resurrect in this proceeding — whether Comsat should be required to pay space station fees under Section 9 based on its use of Intelsat satellites. The Court and the Congress have answered that question in the affirmative.

### **III. Comsat Should Pay Full Space Station Fees.**

In the portion of its comments in which Comsat is not endeavoring to reargue issues that already have been decided by the D.C. Circuit or resolved by Congress, Comsat attempts to find a rationale for reducing its space station fee liability. It is, however, unsuccessful in this effort.

First, Comsat attempts to shift its fee liability to direct-access users of Intelsat services. See Comsat Comments at 18-19. Of course, direct-access users and Comsat are *not* similarly situated with respect to Intelsat satellites and the Intelsat system. Unlike Comsat, direct-access users hold no ownership interest in Intelsat; they have no say in the operation and management of the Intelsat system; and they receive no “compensation” when others use Intelsat facilities. Comsat, by contrast, is the single largest equity owner of Intelsat and is the exclusive U.S. owner. Comsat remains the U.S. Signatory to Intelsat; it participates as the Signatory in the operation and management of the Intelsat system; and direct-access users must pay Comsat whenever they access Intelsat satellites. See Direct Access to the Intelsat System, IB Docket No. 98-192 (rel. Sept. 16, 1999). Comsat’s unique status generates regulatory expenses that are absent in the case of direct-access users, and even the most distorted reading of Section 9 cannot justify shifting Comsat’s liability for space station fees to these customers.

Next, Comsat renews its claim that it should pay only 17 percent of the space station fees for which it would otherwise be liable because it uses only about 17 percent of Intelsat’s utilized-capacity. See Comsat Comments at 21-22. As PanAmSat demonstrated in its initial comments, however, Comsat’s proposal is inconsistent with prior Commission precedent. See PanAmSat Comments at 1-2. The Commission expressly has rejected the notion that the costs it incurs in regulating space stations are a function of the number of transponders that are in use. See Assessment and Collection of Regulatory Fees for Fiscal Year 1995, 10 FCC Rcd 13512 (1995) ¶ 111.

Finally, Comsat suggests that, because ORBIT was not enacted until March 17, 2000, its fee liability should be pro-rated “to reflect only that portion of FY 2000 during

which the ORBIT Act was actually in effect.” Comsat Comments at 23. In fact, however, as the D.C. Circuit held in PanAmSat, Comsat never was statutorily exempt under Section 9 from paying space station fees for its use of Intelsat satellites. ORBIT did not, therefore, add anything to the FCC’s authority. Instead, ORBIT merely requires the FCC to do what it could have, and should have, done since the inception of the regulatory fee program — ensure “parity of treatment” by assessing Comsat for space station fees, just as it assesses such fees against Comsat’s competitors. Accordingly, there is no retroactivity bar to requiring Comsat to pay a full space station regulatory fee for each of the satellites in the Intelsat system.<sup>4</sup>

#### CONCLUSION

Accordingly, Comsat should be assessed the same space station regulatory fee as operators of U.S.-licensed geostationary satellites.

Respectfully submitted,

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<sup>4</sup> Given that ORBIT was not in effect as of October 1, 1999, Comsat makes an even broader claim that it should not be liable for any FY 2000 space station regulatory fee because it was not “within the coverage of Section 9 on October 1, 1999.” Comsat Comments at 23. As set forth above, however, the D.C. Circuit has held to the contrary.